INDEX

	Page
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT	1
DECISION TO BE REVIEWED	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-5
ARGUMENT	6-11
CONCLUSION	12
CERTIFICATE OF SERVICE	13

INDEX TO APPENDIX

		Page
1.	OPINION OF COURT OF APPEALS	1-9
2.	ORDER DENYING THE RE-HEARING	10
3.	FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT FILED SEPTEMBER 23, 1971	11-14
4.	ORDER OF TRIAL COURT DATED OCTOBER 18, 1971	15-16

AUTHORITIES

Cases	Page
Clay v. Sun Insurance Office, Ltd., 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229	10, 12
Continental Casualty Co. v. Westinghouse Electric Supply, 403 F.2d 761 (5th Cir. 1968)	10
Erie Railroad Co. v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 28 L.Ed. 118	10
Kenney v. Trinidad Corp., 349 F.2d 832, 839 (5th Cir. 1965)	10, 11
Klaxon Co. v. Stenton Electric Manufacturing Company, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477	10
W. F. Thompson Construction Co. v. Southeastern Palm Beach County Hospital District, 174 So.2d 410 (Fla. App. 1965)	9
Sun Insurance Office, Ltd. vs. Clay, 133 So.2d 735, 738 (Fla. 1961)	10
Wood & Selich v. Compagnie Generale, 43 F.2d 941 (2 Cir., 1930)	7, 12

CONSTITUTIONAL, STATUTORY & RULE PROVISIONS

Florida Statute, §95.03 (1969)	3, 5, 9
Florida Statute, §95.11, 5(e)	3
Mexican Federal Labor Law, Title 10, §517	3
Rule 19, 1(h) Supreme Court Rules	2
28 USC §1254(1)	2

In the Supreme Court of the United States

OCTOBER TERM, 1972

CASE NO. _____

NEIL W. GILLIES,

Petitioner,

vs.

AERONAVES DE MEXICO, S.A.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District

---

Petitioner, NEIL W. GILLIES, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered August 28, 1972, in Case No. 71-3464.

DECISION TO BE REVIEWED

The Opinion of the Court of Appeals, not yet reported (A. 1-9), reverses the Findings of Fact and Conclusions of Law of the United States District Court of the Southern District of Florida, Case No. 70-1842-Civ-PF (A. 11-14), which were in favor of the petitioner in said cause.

JURISDICTION

The judgment of the Court of Appeals of the Fifth Circuit was entered on August 28, 1972. A timely petition for rehearing en banc was denied on October 4, 1972, and this Petition for Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is envoked under 28 USC §1254(1) and Rule 19, 1(h), Supreme Court Rules.

QUESTIONS PRESENTED

I.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND THEREFORE CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA, LAW WHICH BARRED PETITIONER'S CLAIM?

II.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA?

STATUTORY PROVISIONS INVOLVED

Florida Statutes, §95.03 (1969):

"All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Florida Statutes, §95.11, 5(e):

"Actions other than those for the recovery of real property can only be commenced as follows:

* * *

(5) Within three years.—

* * *

(e) And an action upon a contract, obligation or liability not founded upon an instrument of writing * * *."

Mexican Federal Labor Law, Title 10, §517:

"Actions of workers who are dismissed from work shall lapse in two months."

STATEMENT OF THE CASE

Petitioner, NEIL W. GILLIES, a citizen of the United States residing in Miami, Florida, brought an action against the respondent, AERONAVES DE MEXICO, S.A., an air flagline of the Republic of Mexico, seeking to recover damages claimed to be due petitioner under the provisions of the Mexican Federal Labor Law based upon the discharge of the plaintiff from the defendant's employ without cause. Petitioner claimed that he fully and properly performed services for the respondent as a navigator during the term of his employment and that his employment was based upon an unwritten contract with the respondent for an indefinite term and that this contract incorporated the benefits of the Mexican Federal Labor Law.

Petitioner further claimed that his contract with the respondent was terminated and he was separated without cause and was, therefore, entitled to the benefits contained in the Mexican Labor Law.

The respondent raised the main defense that petitioner's claim was barred by the lapsing provisions of the Mexican Labor Law.

The case was tried before the District Court without a jury, and upon the evidence presented, the trial court found for the petitioner, and in so doing determined that the petitioner's cause of action arose in the State of Florida; that the plaintiff was terminated without justifiable cause; and that the plaintiff was entitled to the benefits of the Mexican Labor Law. The trial court further found

that the issue of limitations was procedural and not substantive, and that the Florida statute applied rather than the lapsing provisions of the Mexican Labor Law (A. 14).

Thereafter the respondent entered its appeal to the United States Court of Appeals for the Fifth Circuit, which rendered an Opinion and Order dated August 28, 1972 (A. 1-9), holding the lapsing provisions of the Mexican Federal Labor Law to be substantive and applicable to the petitioner's claim, under an exception to the general rule that the law of the forum controls procedural matters. The appellate court thereupon held that the District Court was in error in not applying the limitations of the Mexican law to the petitioner's claim, and the judgment of the trial court was reversed.

The appellate court apparently neglected to consider the public policy of Florida and its application to the petitioner's claim as set forth in Florida Statute §95.03 (1969). Thereafter, a Petition for Rehearing and Suggestion for Hearing En Banc were filed by the petitioner, which were denied by Order of the Court of Appeals for the Fifth Circuit dated October 4, 1972 (A. 10).

The initial action was brought by the petitioner in the Circuit Court of the Eleventh Judicial Circuit of Florida, but was removed by petition of the respondent to the United States District Court, Southern District of Florida, on the basis of a diversity of citizenship between the respective parties.

ARGUMENT

I.

THE APPEALS COURT ERRED IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND, THEREFORE, CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA, LAW.

The decision of the Court of Appeals wholly misconstrues the lapsing provisions of the Mexican Federal Labor Law by holding that Florida courts would characterize the lapsing provisions as exceptions to the general rule, and therefore substantive rather than procedural. This conclusion is reached by the appellate court holding that the petitioner's right is created by the Mexican law, the period of limitations is contained in the law, and the lapsing period, or limitation, is specifically applicable to the petitioner's situation.

The petitioner's cause of action was based on breach of contract. The claim sought to be enforced is not a statutorily created one, although the contract embodies the terms and benefits of the statute. However, had there been no contract, there would have been no cause of action.

The appellate court found that Florida generally follows the traditional rule that a statute of limitations is procedural for the purposes of choice of law requiring

the lex fori to be applied. Florida also recognizes the exception to this general rule when an entirely new right of action is created by statute, and that same statute provides a limitation of time for the enforcement thereof.

Clearly, the appellate court overlooked the fact that the petitioner's claim was founded upon a contract, the action to enforce it was based upon contract and therefore not controlled by those cases, involving the exception to the well-established rule, applying the law of a foreign jurisdiction, other than the place of making the contract, rather than the law of the forum where the litigation is being undertaken.

The appellate court, in arriving at the conclusion set forth in its Opinion, considered a number of cases which were completely inapposite to a contract action of the type here involved. The Opinion completely overlooks the test enunciated in the case of *Wood & Selich v. Compagnie Generale*, 43 F.2d 941 (2 Cir. 1930), which, it is contended, is the case that Florida would follow in construing the Mexican Federal Labor Law lapsing provisions. Moreover, it appears that the appellate court overlooked certain other facts pertaining to the petitioner's contract. It was established that the contract was entered into in Florida; the petitioner was based in Florida; paid in Florida; and discharged in Florida. The respondent was engaged in doing business in Florida and, in fact, the only connection between the respondent and the Republic of Mexico is that the respondent, Aeronaves de Mexico, is a flag airline of that country. Therefore, the interest of the State of Florida in the contract and its interpretation would appear to outweigh the interest of the Republic of Mexico.

In fact, it would appear that since this is a contract action, and not statutory; since expert testimony which was uncontradicted, established that the Mexican lapsing provisions bar but do not extinguish one's contract rights; and since Florida has the greater interest in the application of its law in this case, it must logically be concluded that Florida would follow the general conflicts-of-law ruling and construe the Mexican lapsing provisions as procedural and not applicable.

The Mexican Federal Labor Law has been in existence for over 20 years for the sole purpose of benefiting the worker and not the employer, and is so constructed as to construe every doubt, ambiguity and question concerning the law in favor of the worker and against the employer.

Clearly, the conclusion of the appellate court that Florida would consider the claim of the petitioner to be an exception to the general rule for enforcement of contracts was without realistic support in the evidence or the law and therefore erroneous.

II.

THE APPEALS COURT ERRED IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA.

The appellate court apparently failed to realize that its opinion was diametrically opposed to public policy of the State of Florida as expressed by statute. Florida Statute §95.03 (1969) states:

> "All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

This statute has been interpreted and upheld by the following decisions:

> *W. F. Thompson Construction Co. v. Southeastern Palm Beach County Hospital District*, 174 So.2d 410 (Fla.App. 1965).

Continental Casualty Co. v. Westinghouse Electric Supply, 403 F.2d 761 (5th Cir. 1968).

Attention is called to the fact that in this diversity action, conflicts of laws, rules and public policy of Florida controls. *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 28 L.Ed. 118; *Klaxon Co. v. Stenton Electric Manufacturing Company*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477.

In fact, this Florida statute has been interpreted by the Supreme Court of Florida as applying to

> "[a]ny contract whatever—foreign or domestic —when Florida's contact therewith, existing at the time of execution or occurring thereafter, is sufficient to give a court of this State jurisdiction of a suit thereon." *(Sun Insurance Office, Ltd. v. Clay*, 133 So.2d 735, 738 (Fla. 1961).)

It should also be noted that the constitutionality of this Florida statute along with the interpretation given it by the State of Florida were upheld by the United States Supreme Court in *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229.

In discussing the State-interest of Mexico while neglecting to consider the public policy of Florida, the appellate court quoted, on page 8 of its Opinion, from the case of *Kenney v. Trinidad Corp.*, 349 F.2d 832, 839 (5th Cir. 1965), the following:

> "The state that creates the cause of action has an obvious interest in determining how long it can be enforced, but the forum has relatively little to set against the interest of the foreign state. There is something to be said for applying

> the prescriptive period of the forum if it is shorter than the foreign period: the courts of the forum should not be forced to decide stale claims merely because the foreign state has a longer period of limitation. But the forum has no particular interest in applying a longer period of limitation."

However, the appellate court apparently overlooked the first sentence of the next paragraph following the quote, which states:

> "[i]n applying conflict rules, courts reserve the right to enforce a strong foreign law *if it is contrary to a strong public policy of the forum.*" (Emphasis added)
>
> *Kenney v. Trinidad, supra,* 839.

As the appellate court pointed out in its Opinion on page 3, the plaintiff "[h]ad all of his contracts with Aeronaves in Miami, where he was hired, based, paid and fired."

Thus, it would appear that the lex loci contractus was in Florida, and that Florida's law would apply concerning the remedy for the wrongful discharge of the petitioner. However, both parties contracted that the Mexican Federal Labor Law would apply. For that reason the remedies provided in the Mexican Federal Labor law must apply in the present case; however, in light of Florida's strong public policy prohibiting the application of any provision in any contract which would fix a period of time less than that provided by Florida's Statute of Limitations, the Mexican lapsing provisions, even if construed as substantive, could not be enforced in Florida. To attempt to do so is strictly against Florida's public policy and void.

CONCLUSION

The appellate court, in failing to apply the principals set forth in *Wood & Selich v. Campagnie Generale, supra*, and likewise the appellate court in ignoring the public policy of the State of Florida which has been recognized by the Court in *Clay v. Sun Insur. Office, Ltd., supra*, has rendered a decision in conflict with a decision of the Supreme Court and another Court of Appeals, and has decided an important state question in a way which conflicts with applicable state law which calls for an exercise of this Court's power of supervision, and a writ of certiorari should therefore issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JOHN W. PRUNTY
and
GUION T. DeLOACH
Counsel for Petitioner
837 City National Bank Building
Miami, Florida 33130

by_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District was mailed this _____ day of December, 1972, to SHUTTS & BOWEN, Attorneys for Respondent, 1000 First National Bank Building, Miami, Florida 33131.

JOHN W. PRUNTY

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3464

NEIL W. GILLIES,

Plaintiff-Appellee,

versus

AERONAVES DE MEXICO, S.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(August 28, 1972)

Before TUTTLE, MORGAN and RONEY, Circuit Judges.

RONEY, Circuit Judge: Neil W. Gillies brought this action against Aeronaves de Mexico, S.A., the Mexican national airline, seeking to recover damages allegedly due him under the provisions of the Mexican Federal Labor Law because of his wrongful discharge from employment with the airline. He recovered $47,666.66 in damages. The district court concluded that the Florida State of Limitations was controlling, not the limitation period in the Mexican Law which would have barred the suit. We held that the Mexican Law should apply, that the suit was not timely brought, and that the judgment should be reversed.

THE FACTS

Gillies is a citizen of the United States residing in Miami, Florida. He was originally employed in 1959 as a navigator for Aerovias Guest Airlines flying from Miami to Bermuda and Europe. He continued in the employ of this airline until its merger with Aeronaves. On March 1, 1963, Aeronaves employed Gillies as a navigator on the Miami to Madrid run. This employment arrangement was evidenced by a memorandum in writing dated March 5, 1963, and was for a one year period commencing on March 1, 1963, and ending on the last day of February, 1964.

Upon the expiration of the first year of employment Gillies continued as navigator on the same flight run until his employment was terminated by Aeronaves on June 30, 1968. The termination was found by the trial court to be without justifiable cause. From the end of February, 1964, until the termination the parties did not enter into a written contract nor was there in existence any written memorandum evidencing the employment conditions.

Since Gillies was a United States citizen, Aeronaves secured Mexican work permits for him in compliance with Mexican law. These were usually for a year or six months and were renewed from time to time as required. At the time Gillies was discharged he was covered by a Mexican work permit which had not expired.

Gillies had all his contacts with Aeronaves in Miami where he was hired, based, paid, and fired. Aeronaves had a facility in Miami and was licensed by Florida to conduct business there.

We agree that the district court had jurisdiction of the parties and the subject matter of this cause.

THE MEXICAN FEDERAL LABOR LAW

The Mexican Federal Labor Law provides certain benefits for employees who are unjustly terminated from their jobs. Although in dispute, it can be assumed for the purpose of this decision that the district court correctly held that plaintiff's employment was terminated without justifiable cause within the meaning of the Mexican Law. In such case, to be exempt from the obligation of reinstating the employee, the employer must pay the following compensation under Article 125 of the 1931 Law:

> Article 125.—The compensations mentioned in the foregoing Article shall consist of:
>
> I. Three months' wages.
>
> II. If the work relation should be for a specific period of time not exceeding one year: a sum equal to the wages payable for one-half the period that services were rendered. If exceeding one year: a sum equal to six months' wages for the first year and equivalent to twenty days' wages for each following year during which services were rendered.
>
> If the work relation was for an indefinite period, the indemnity shall consist of twenty days' wages for each year's service.
>
> III. The amount of the unearned wages for the period elapsing from the date of dismissal until the indemnities mentioned in the two foregoing Sections have been paid.

No indemnity had been paid to plaintiff, and the district court held that he was entitled to unearned wages to the date of judgment under provision III.

This Law provided that the rights granted thereunder "shall lapse in one month" and that "the term for lapsing shall run from the moment of discharge." In 1970 a new law was substituted which provides that such actions "shall lapse in two months" and that "lapsing shall commence to run from the day following the date of dismissal." Although there is some dispute as to which law should be used to decide the substantive question, the matter is of no concern to the limitations argument. Under the one law plaintiff had until July 30, 1968, and under the other until August 30, 1968. Under either statute his suit filed on November 25, 1970, would be barred.

THE ISSUE

The trial court decided that the suit was not barred by the Florida Statute of Limitations, a point disputed but unnecessary for us to resolve. It held that the Florida law applied and not the Mexican law because the limitations and lapsing provisions "are procedural provisions of the Mexican Federal Labor Law and cannot be applied by this Court." This appeal squarely raises the question of whether the law of the forum, Florida, or the law by which the contract is to be governed, Mexico, is to supply the controlling statute of limitations.

THE DECISION

Since this is a diversity case, the issue is to be decided as if it were being determined in a Florida court applying the Florida conflict of laws rule. Klaxon Co. v. Stentor

Electric Mfg. Co., 313 U.S. 487 (1941). Florida follows the general rule of conflicts in contract actions. The construction of the contract and the legal rights flowing therefrom are controlled by the lex loci contractus, meaning either the law of the place where the contract was made, or the law by which the contract is to be governed if the cause of action arises under the laws of a foreign jurisdiction other than the place of the making of the contract. Hagen v. Viney, 169 So. 391 (Fla. 1936). The law of the forum where the litigation is taking place, the lex fori, governs in procedural matters. Ferris & Co. v. William Schluderberg, T. J. Kurdle Co., 193 So. 429 (Fla. 1940).

It is agreed that Mexican law controls the substantive rights and liabilities of the parties. The question then is whether the Mexican limitations period is substantive or procedural. If it is procedural, the district court was correct in not applying it. If it is substantive, then plaintiff's claim is barred. Again, whether the provision is procedural or substantive must be determined by Florida law. *Fahs v. Martin*, 224 F.2d 387 (5th Cir. 1955).

Generally, Florida follows the traditional rule that a statute of limitations is procedural for the purposes of choice of law requiring the lex fori to be applied. Van Deren v. Lory, 100 So. 794 (Fla. 1924). However, Florida has long recognized an exception to this general rule. When an entirely new right of action is created by statute, and the same statute provides the limitation of time within which the action must brought, then

> "[s]uch a limitation of time is not like the ordinary statute of limitation affecting merely the

> remedy, but it enters into and becomes a part of the right of action itself, and if allowed to lapse without the institution of the action, such right of action becomes extinguished and is gone forever." Fowler v. Mathney, 184 So.2d 676, 677 (Fla. App. 1966).

See La Floridienne, J. Buttgenbach Co. v. Seaboard Air Line Ry., 52 So. 298 (Fla. 1910); Bowery v. Babbit, 128 So. 801 (Fla. 1930). This exception is well established in American jurisprudence:

> "There is one well-settled exception to the general rule that forum law governs statutes of limitation. When a statute which creates a right specifies that the existence of its new creation shall continue only for a limited length of time, there is no existent right beyond what the statute has created, and no other state, even though its statute would allow a longer period for such suits, will entertain an action on a right which has ceased to exist." Leflar, American Conflicts Law, §127, at page 305 (Rev. Ed. 1968).

In an early Supreme Court case, the rationale for this principle was succinctly stated by Justice Holmes:

> "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act,

> it follows that the law determines, not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." Slater v. Mexican National Railroad Co., 194 U.S. 120, 126 (1904).

In a Fifth Circuit case, when refusing to apply a Louisiana Workmen's Compensation Law without applying the Louisiana limitation period, Judge Sibley considered the limitation period as a condition of the right, stating:

> "While ordinarily the limitations of the forum are applied as pertaining merely to the remedy, there is an exception where the cause of action is created by a foreign statute which also fixes a limitation for its assertion. The limitation is then considered to be a condition of the right, so that no recovery is allowed where recovery would be barred by the law which gives the right." Ford, Bacon & Davis v. Volentine, 64 F.2d 800, 802 (5th Cir. 1933).

Judge Wisdom later expressed the principle in terms of state interest in Kenney v. Trinidad Corp., 349 F.2d 832, 839 (5th Cir. 1965):

> "The state that creates the cause of action has an obvious interest in determining how long it can be enforced, but the forum has relatively little to set against the interest of the foreign state.

> There is something to be said for applying the prescriptive period of the forum if it is shorter than the foreign period: the courts of the forum should not be forced to decide stale claims merely because the foreign state has a longer period of limitation. But the forum has no particular interest in applying a longer period of limitation."

The lapsing provisions could have been "interrupted" if, within the lapsing period, Gillies had filed a claim against Aeronaves with the Mexican administrative board set up by the Law to handle employer-employee disputes of this genre. It could also have been "interrupted" if the defendant had recognized verbally, in writing or by unquestionable acts, the right of Gillies. Neither of these events took place. There is no provision for a revival of the right once it has lapsed. The import of the Law is that it is the right which lapses, and not the remedy.

The impact of liability created by the statute is a matter of Mexican interest. It is entirely proper that Mexican law should control the extent of that impact. The very words of the law speak in terms of the lapsing of a right, and not in terms of a bar to its enforcement.

Regardless of which rationale is used, we think that the Florida courts would hold that the lapsing provision of the Mexican Labor Law is substantive and should be applied under the exception to the general rule. The employee's right is created by the Law, the period of limitations is contained in the Law, and the lapsing period is specifically made applicable to employees in Gillies' situation.

The justice of this conclusion is all the more evident because of the continuing liability and increasing amount of damages that accrue under the Law through the delay in payment of the claim. The Law gives a right to wages "from the date of dismissal up to the date the indemnities are paid." The importance of a speedy resolution of any claim is readily apparent. The delay of two years in bringing the claim resulted in a considerably larger judgment against defendant than Gillies could have obtained if he had brought the suit within the period required and it had been promptly determined and paid. Thus the very nature of the Law causes the lapsing period to have a direct effect upon the amount of the liability. With such a substantive effect on the amount of the claim, the argument that the lapsing provisions are only procedural loses all force.

The Mexican limitation period should have been applied. Under it Gillies' claim had lapsed. The district court should have denied recovery.

REVERSED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3464

NEIL W. GILLIES,
Plaintiff-Appellee,

versus

AERONAVES DE MEXICO, S.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 28, 1972, 5 Cir., 1972, ____ F.2d ____).

(October 4, 1972)

Before TUTTLE, MORGAN and RONEY, Circuit Judges.

PER CURIAM: The argument in the petition for rehearing in reference to the Mexican Labor Law and the clearly erroneous doctrine of Rule 52(a) apparently overlooks Rule 44.1, Federal Rules of Civil Procedure. The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 70-1842-Civ-PF

NEIL W. GILLIES,

Plaintiff,

vs.

AERONAVES DE MEXICO, S.A.,
a Mexican corporation,

Defendant.

[Filed September 23, 1971]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for trial before the Court without a jury, at which the parties appeared together with their respective counsel.

Based upon stipulations of the parties and upon the evidence adduced at trial, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court has jurisdiction of this cause and of the parties by reason of diversity of citizenship and claims in excess of the sum of Ten Thousand Dollars ($10,000.00). At all times relevant hereto, Plaintiff is a resident of Dade County, Florida, and the Defendant is a corporation organized and existing under the laws of the Republic of Mexico, with its principal place of business located in Mexico City.

2. Defendant is the national air carrier of Mexico operating as such throughout Mexico and internationally between Mexico and foreign countries, including the United States. Its administrative, executive and accounting offices and its maintenance and overhaul facilities are all located in Mexico.

3. Defendant maintains business offices and airport facilities in Dade County, Florida, and employs a number of employees at such offices.

4. The Plaintiff was employed by the Defendant in Miami, Florida, as a flight navigator for a period commencing on March 1, 1963, and ending on June 30, 1968. During plaintiff's employment by the Defendant, Plaintiff fully and properly performed his services and was compensated therefor as agreed.

5. The Plaintiff's employment in Miami, Florida, was pursuant to an oral agreement which, by implication, incorporated substantive provisions of the Mexican Federal Labor Law. In fact, the testimony indicated the Plaintiff would not have accepted employment without the benefits of the Mexican Federal Labor Law.

6. The Plaintiff was based in Miami, Florida, and performed as a flight navigator on round-trip flights between Miami, Florida, and Madrid, Spain. In 1966, the Plaintiff in connection with his navigation duties performed certain flight training of navigators for the Defendant while on these round-trip flights. Plaintiff received his pay in Miami, Florida, and was granted expenses for time spent away from his home base.

7. The Plaintiff's employment was terminated by the Defendant as of June 30, 1968, in Miami, Florida, without justifiable cause.

8. The Plaintiff's period of employment extending from March 1, 1963, to June 30, 1968, entitled him to the indemnities and benefits of the Mexican Federal Labor Law. The Plaintiff's termination was accomplished in Miami, Florida.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following conclusions of law:

1. The Court has jurisdiction of the parties and of the subject matter of this cause.

2. Plaintiff's cause of action arose in Florida and he is entitled to bring this suit.

3. Plaintiff's termination was without justifiable cause.

4. Plaintiff, as an employee of the Defendant, is entitled to the indemnities and benefits of the Mexican Federal Labor Law.

5. The statute of limitations of the State of Florida is applicable. The limitations or lapsing provisions as well as the provisions for boards of conciliation and arbitration are procedural provisions of the Mexican Federal Labor Law and cannot be applied by this Court.

6. Plaintiff is entitled to recover a judgment against the Defendant in the amount of $47,666.66.

WHEREFORE, judgment shall be entered for the Plaintiff and against the Defendant in the amount above specified, and an Order shall be entered accordingly.

/s/ Peter T. Fay

U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-1842-Civ-PF

NEIL W. GILLIES,

Plaintiff,

vs.

AERONAVES DE MEXICO, S.A.,
a Mexican corporation,

Defendant.

ORDER

THIS MATTER came before the Court upon the defendant, AERONAVES DE MEXICO, S.A.'s Motion for New Trial and to Amend and Alter Findings of Fact and Conclusions of Law and Final Judgment.

The Court has reviewed the motion and supporting memorandum. The Court considered all of the points raised by the defendant prior to the entry of judgment and finds them without merit.

However, upon reviewing the Findings of Fact and Conclusions, the Court noticed that it failed to state the specific section of the Florida Statute of Limitations which is applicable to this cause. The Court, therefore, will amend

its Findings of Fact and Conclusions of Law to specifically state the subsection which is applicable. It is, therefore—

ORDERED AND ADJUDGED that the defendant's Motion for New Trial and to Amend and Alter Findings of Fact and Conclusions is hereby denied, and it is

FURTHER ORDERED AND ADJUDGED that paragraph 5 of the Conclusions of Law in the Findings of Fact and Conclusions of Law entered by this Court on September 22, 1971, is hereby amended to read as follows:

> "5. The statute of limitations of the State of Florida is applicable, specifically Section 95.11 (5) (a), Florida statutes. The limitation or lapsing provisions as well as the provisions for boards of conciliation and arbitration are procedural provisions of the Mexican Federal Labor Law and cannot be applied by this Court."

DONE AND ORDERED at Miami, Florida this 18th day of October, 1971.

/s/ Peter T. Fay

UNITED STATES
DISTRICT JUDGE